turnarounds & workouts

News for People Tracking Distressed Businesses

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It's Universal

Isle of Man Waste2Energy Decision Affirms Universalism

by Julie Schaeffer

The Isle of Man's High Court of Justice has issued a ruling in the Waste2Energy bankruptcy that clarifies what jurisdiction will be applied in multi-jurisdictional solvency proceedings.

"The Waste2Energy decision represents a strong and clear indication that courts and practitioners in offshore jurisdictions see themselves as being part of a global community and are embracing universalism," says Wayne Weitz, a senior director at Gavin/Solmonese, who serves as Chapter 11 trustee in the bankruptcy.

Waste2Energy was a renewable energy company that developed a process called small batch oxidation systems (SBOS), a technology that converts biomass or other solid waste

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Big Boys Are on Their Own

Agreements Enforced in Recent New York Opinions

by Randall Reese

Over the past decade, there has been a significant expansion in the use of "big boy" letters in agreements governing the sale of securities, real estate, and other assets. In a "big boy" letter, the parties to a transaction acknowledge that one party may have non-public information, but the parties have decided to enter into the transaction notwithstanding the nondisclosure of such information. Importantly, the party not privy to the non-public information represents that it is not relying on any of its counterparty's nondisclosures and that it is waiving all claims against its counterparty arising out of the nondisclosure.

In two recent decisions, courts in New York have been presented with challenges to

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Decision Making in Bankruptcy

Strategic or Simply Dictated by Circumstances?

by Julie Schaeffer

Decision making has become increasingly strategic, with individuals and companies timing their purchases to coincide with the best deals.

Case in point: airline tickets. In the past, individuals purchased airline tickets based on need to travel. Today, many of them plan their travel based on air ticket prices.

It's a transformation that has affected many industries, including bankruptcy, according to a study conducted by Harlan D. Platt, a professor of finance at Northeastern University D'Amore-McKim School of Business, Christopher R. Mirick, a partner at Pillsbury Winthrop Shaw Pittman LLP, and Marjorie A. Platt, senior associate dean, dean of faculty,

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streams traditionally destined for landfill into clean renewable energy. "Most of the time this process involves a loud and unsightly facility that has to sit outside a city, but Waste2Energy differentiated itself by developing smaller units that could be placed inside a warehouse in the center of a city," says Weitz.

In 2009, Waste2Energy – founded by an Icelandic company that was later acquired by a Delaware company – completed a reverse-merger with Maven Media Holdings, Inc., a public shell. It began doing business under the name Waste2Energy Holdings, Inc., and raised around $10 million from U.S. investors.

This structure would later be significant. "On the top level, there was a public holding company that had notes outstanding," says Weitz. "One level down, there was the original Delaware company. One level below that were a number of subsidiaries, including two incorporated in the Isle of Man."

Through a series of maneuvers, Waste2Energy transferred title to its patent-pending technology into one of the Isle of Man subsidiaries. John Murphy, the company's CEO, stepped down in keeping with the terms of the merger agreement, but remained Waste2Energy's biggest shareholder and gave himself a $300,000-per-year consulting agreement with the company.

According to court filings, the company never achieved its goal of implementing its technology. "The technology never worked as planned," he says. "For example, the company was supposed to build a plant for a customer in Scotland, but said it didn't have the money to complete the required modifications. Instead, the customer paid to build the plant and develop some additional technology. At the end of the day, all the company had was a patent pending in more than 25 jurisdictions around the world, but at the time of the involuntary bankruptcy filing none had been granted."

In 2011, four parties – one company and three individuals alleging they held $3.2 million of Waste2Energy bonds – filed an involuntary Chapter 11 bankruptcy petition against the company in Wilmington, Delaware. "The investors wanted an involuntary bankruptcy because there were discussions with a Canadian company that wanted to buy

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these types of provisions and, in both cases, enforced the agreements in the face of allegations of fraud in connection with the transactions at issue. These cases are particularly notable due to the relationships between the parties, according to Janice Mac Avoy, the co-head of the real estate litigation practice group of Fried, Frank, Harris, Shriver & Jacobson LLP.

In the first case, *Pappas v. Tzolis,* the two plaintiffs and the defendant had formed a limited liability company to enter into a long-term lease on a building in Lower Manhattan. The relationship among the three quickly became contentious and, approximately a year later, the defendant bought the plaintiffs' membership interests in a transaction that valued the company at $2.5 million. In connection with the sale, the parties entered into agreements containing representations that the plaintiffs had performed their own due diligence, engaged their own legal counsel, and were not relying on any representation by the defendant. The plaintiffs further agreed that the defendant owed no fiduciary duty to them in connection with the sale.

Approximately eight months after the sale of the membership interests, the company assigned its lease to a third party for $17.5 million. The plaintiffs later "came to believe that [the defendant] had surreptitiously negotiated the sale with the development company before he bought their interests in the LLC." They sued on the theory, among others, that the defendant had breached his fiduciary duty to the plaintiffs by failing to disclose those negotiations.

New York's highest court rejected the plaintiffs' arguments and ordered their complaint dismissed. In framing the issue, the court stated that the "test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that would make reliance on the fiduciary unreasonable." In applying that standard to this case, the court noted that "plaintiffs were sophisticated businessmen represented by counsel" and, further, that that "relationship between plaintiffs and [defendant] had become antagonistic, to the extent that plaintiffs could no longer reasonably regard [the defendant] as trustworthy."

Therefore, the court determined that

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Decision Making, *from page 1*

and accounting professor at Northeastern University D'Amore-McKim School of Business. Their research on the subject appeared in a recent article published in the *Journal of Bankruptcy Law*.

"Our research asks a simple question," say the Platts and Mirick, "Do bankruptcy filings simply happen when an entity's circumstances require it, or has the decision to file for bankruptcy protection evolved into a strategic matter?"

The most simplistic view of bankruptcy decisions is that of a struggling company realizing its circumstances are unlikely to improve, then filing a petition seeking relief from the bankruptcy court.

If the simplistic view of bankruptcy is the prevailing one, the rate of bankruptcy filings would be the same year to year, and throughout the year – but that's not always the case, at least anecdotally.

Consider, for example, the implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). That act made several significant changes to the corporate bankruptcy process – for example, limiting the ability of debtors to deal with commercial leases and restricting financial incentives to the management of companies in bankruptcy. During the period between the legislation's birth and its passage, it would appear – anecdotally – that the number of bankruptcy filings increased dramatically.

One possible reason for the increase: Companies were being strategic and rushed to take advantage of the leniency of the pre-BAPCPA Bankruptcy Code.

That got Harlan Platt thinking. "I had two motivations for this," says Platt. "First, I was thinking about families and the holiday season, that it's ironic that people probably overspend at Christmas time then disproportionally decide to go bankrupt thereafter. Then, I wondered if the same calendar-year effect was true for companies in regard to issues such as tax-timing decisions."

Platt called Mirick and asked him just that. Have companies adopted more sophisticated decision-making techniques to decide when to file? For example, instead of simply considering financial conditions, might they also consider changes in regulations and more – such as stimulus programs, the start of a new fiscal or calendar year, or tax-filing deadlines?

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Research Report

Who's Who in K-V Pharmaceutical Company

by Francoise C. Arsenault

K-V Pharmaceutical Company (K-V) is a specialty branded pharmaceutical marketing company primarily focused on women's health care products. K-V holds numerous domestic and foreign issued patents related to its controlled-release, site-specific, quick dissolve, and vitamin absorption technologies. The company also owns or holds licenses to 34 U.S. patents and has 12 U.S. patent applications pending, and approximately 32 foreign patents and numerous foreign patent applications pending, primarily in Canada, Europe, Australia, Japan, South America, Mexico, and South Korea. K-V also owns more than 300 U.S. and foreign trademark applications and registrations. The company's most valuable product is Makena®, the first and only FDA-approved drug to reduce the risk of pre-term birth for pregnant women with a history of singleton spontaneous pre-term birth.

The company, which is headquartered in Bridgeton, Missouri, sells its products directly to wholesalers, distributors, retail pharmacy chains, mail order pharmacies, and group purchasing operations. K-V also markets to "indirect customers" such as independent pharmacies, managed care organizations, hospitals, pharmacy benefit management companies, physicians, and other professionals. Currently, K-V operates only its branded products business through its wholly-owned subsidiary, Ther-Rx Corporation. The company owns four facilities and leases its headquarters. As of its Chapter 11 filing date, K-V had approximately 210 employees.

On August 4, 2012, K-V Discovery Solutions, Inc. and seven of its related entities filed for Chapter 11 reorganization in the United States Bankruptcy Court for the Southern District of New York. K-V Pharmaceutical Company directly owns or is the sole member of each of the seven debtors, including K-V Discovery Solutions, one domestic non-debtor, and three non-debtor foreign subsidiaries. In its bankruptcy filing, K-V listed assets of $237 million and debts of $728 million.

According to company officials, factors leading to bankruptcy included the inability of K-V to realize the full value of Makena® as a result of the FDA's refusal in March 2011 to enforce its drug marketing exclusivity and restrictions on reimbursement imposed by state Medicaid agencies, as well as restrictions on the manufacturing and marketing of other products resulting from a consent decree.

On December 28, 2012, K-V received bankruptcy court approval for $85 million in DIP financing from Silver Point Finance LLC, Whitebox Advisors, LLC, and Pioneer Investment Management, Inc. The DIP financing will be used to fund a $60 million settlement with Hologic, Inc. over the rights to Makena®. The settlement agreement between K-V and Hologic, also approved by the bankruptcy court on December 28, confirms K-V ownership of Makena®. K-V filed its proposed plan of reorganization on January 7, 2013. A hearing on the disclosure statement is scheduled for April 18 and a confirmation hearing is set for June 11, 2013.

The Debtor

Gregory J. Divis, Jr. is President and Chief Executive Officer of K-V Pharmaceutical Company. **Thomas S. McHugh** is a Vice President, the Chief Financial Officer, and Treasurer. **Patrick J. Christmas** is a Vice President, General Counsel, and Secretary.

Willkie Farr & Gallagher LLP is serving as the bankruptcy counsel to K-V. **Matthew A. Feldman**, **Joseph T. Baio**, **Paul V. Shalhoub**, and **Henry M. Cohn**, partners, **Robin Spigel** and **Cindy J. Chernuchin**, special counsel, and **Marina I. Zelinsky**, **Daniel I. Forman**, **Jordan C. Hicks**, **Benjamin P. McCallen**, and **Andrew S. Mordkoff**, associates, are working on the case.

Williams & Connolly LLP is special litigation counsel to K-V. **Richard M. Cooper**, **Philip J. Ward**, and **Holly M. Conley**, partners, and **Michael V. Pinkel**, an associate, are working on the case.

The law firm of **SNR Denton US LLP** is also serving as special litigation counsel to K-V. The team is led by **Gadi Weinreich** and **Margaret Donahue Hall**, partners, and **Oscar N. Pinkas**, a managing associate.

Jefferies & Company, Inc. is the financial advisor and investment banker to K-V. The team includes **Leon Szlezinger** and **Dung Nguyen**, managing directors, **Alexander Rohan**, a senior vice president, **Todd Heglund**, **Eric Lowrey**, and **John D'Amico**, vice presidents, and **Colby Kittrell** and **Jingzhi Dai**, associates.

Ernst & Young LLP is serving as tax advisor to K-V. **Stanley Deptula**, a partner with the firm, leads the engagement.

Brainerd Communicators, Inc. is providing K-V with public relations and media communications services. **Tony Herrling**, a managing director, and **Brad Edwards**, a senior director, lead the engagement.

The Official Committee of Unsecured Creditors

The Committee includes **Deutsche Bank Trust Company Americas**; **Capital Ventures International**; **S.A.C. Arbitrage Fund, LLC**; **Applied Discovery, Inc.**; and **Poretta & Orr, Inc.**

Stroock & Stroock & Lavan LLP is acting as counsel to the Committee. The team includes **Kristopher M. Hansen**, **Erez E. Gilad**, and **Jeffrey D. Uffner**, partners, and **Matthew G. Garofalo**, **Anthony J. Distinti**, **Meryl L. Rothchild**, and **Thomas J. Shiah**, associates.

Arnall Golden Gregory LLP is regulatory counsel. **Darryl S. Laddin**, **William H. Kitchens**, and **Alan G. Minsk**, partners with the firm, and **Jonathan H. Azoff** and **Tyler L. Arnold**, associates, are working on the case.

Curtis, Mallet-Prevost, Colt & Mosle LLP is acting as conflicts counsel. **Steven J. Reisman**, a partner, directs the work.

Duff & Phelps is providing financial advisory services. The team includes **Brent C. Williams**, a managing director, **Eric Sharps**, a senior advisor, **Brendan Murphy**, a director, and **Patrick Dean** and **John Stoddard**, analysts.

The Trustee

The U.S. Trustee is **Tracy Hope Davis**.

The Judge

The judge is the **Honorable Allan L. Gropper**. ¤

Universalism, *from page 2*

Waste2Energy and pay off all bondholders, but Waste2Energy management kept saying it couldn't sell until it got more money," says Weitz. "The Canadian company would give Waste2Energy more money, and Waste2Energy would ask for more. The investors thought a trustee could come in, assess the situation, and honor the deal the Canadians had offered."

After the U.S. Bankruptcy Court for the District of Delaware appointed Weitz trustee, he discovered the Canadian deal wasn't what the investors thought it was. Instead of closing the sale, then, he got the Canadian company to offer a DIP loan and serve as a stalking horse bidder. "We ran an auction process, but no one came to the table," he says. "There was a question about the value of the technology as well as the ownership of the company. The technology was owned by one of the Isle of Man subsidiaries, which, at that point, had been placed into bankruptcy as well."

As trustee, Weitz had the right under Delaware law to proceed with a Section 363 sale of the asset, and did so. That's when the situation got tricky. According to Weitz, "John Murphy, Waste2Energy's former CEO, said he was a creditor at the subsidiary level, and filed an insolvency proceeding in the Isle of Man, which doesn't have a Chapter 11 process, just something akin to a Chapter 7."

"We had to challenge it," Weitz continues. "The company had no connection to the Isle of Man other than its incorporation there, and we were well down the road with proceedings in Delaware."

Deemster David Doyle, the first Deemster in the Isle of Man, made his decision quickly. "He said the Isle of Man had jurisdiction, but given that the case was doing quite well being administered in Delaware and there was really no connection of the business to the Isle of Man, he was waiving jurisdiction," says Weitz.

In delivering his decision, Doyle said there was no sense having separate substantive winding-up proceedings in the Isle of Man because such duplication would cause additional and unnecessary expense, delay, and inconvenience.

As for choosing a jurisdiction, Doyle noted that the United States is the jurisdiction

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"the plaintiffs were in a position to make a reasoned judgment about whether to agree to the sale." Moreover, the need to "use care to reach an independent assessment of the value of the lease should have been obvious to plaintiffs, given that [the defendant] offered to buy their interests for 20 times what they had paid for them just a year earlier."

The second case, *Kafa Investments, LLC v. 2170-2178 Broadway, LLC,* is even more notable, says Mac Avoy, because the parties' relationship was not acrimonious at the time of the transaction. Many practitioners had long believed that "big boy" letters would not be enforceable in such a situation because it would be reasonable for a party to rely upon the fiduciary relationship. However, the New York Supreme Court, New York County, enforced a similar provision in dismissing a suit between co-developers of a real estate project.

In this case, the defendants and plaintiffs negotiated an agreement pursuant to which the plaintiffs' interests in a hotel were redeemed. Five months later, the hotel "was sold to a third party for a reported $201 million, $76 million more than the $125 million value that the defendants represented to plaintiffs." The plaintiffs sued, alleging that the defendants had breached their fiduciary duties by fraudulently undervaluing the hotel.

The defendants moved for summary judgment based upon the agreement, which included a release and waiver of defendants arising from any claims relating to the hotel "whether known or unknown…from the beginning of the world to the closing date." While the plaintiffs alleged that "their relationship of trust with the defendants was fully intact during contract negotiations," the court nonetheless held that "the unambiguous language of the release cannot be abrogated by the fact that the parties were fiduciaries." The court noted that this was particularly the case where sophisticated parties represented by counsel are in negotiations to terminate their relationship.

These recent decisions highlight the importance of parties entering into negotiations with their eyes wide open, Mac Avoy notes. When a "big boy" letter is proposed, the other party must "weigh its desire for finality against the realization that the asset may later be demonstrated to be worth more than the party thought."

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Calendar

Turnaround Management Association
2013 TMA Spring Conference
May 14–16, 2013
JW Marriott Chicago
Chicago, IL
Contact: www.turnaround.org

American Bankruptcy Institute
2013 New York City Bankruptcy Conference
May 16, 2013
Hilton New York
New York, NY
Contact: www.abiworld.org

International Association of Restructuring, Insolvency & Bankruptcy Professionals
Ninth World Congress of INSOL International
May 19–22, 2013
The Hague, The Netherlands
Contact: www.insol.org

Association of Insolvency and Restructuring Advisors
29th Annual Bankruptcy & Restructuring Conference
June 5–8, 2013
Westin Chicago River North
Chicago, IL
Contact: www.airacira.org

National Association of Bankruptcy Trustees
2013 Annual Convention
August 8-11, 2013
The Greenbrier
White Sulphur Springs, WV
Contact: www.nabt.com

National Conference of Bankruptcy Judges
87th NCBJ Annual Conference
Oct. 30–Nov. 2, 2013
Atlanta, GA
www ncbj.org

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Special Report

Regional and Local Bankruptcy Accounting Firms

Firm	Senior Partners/Professionals		Representative Clients
Bederson & Company West Orange, NJ Tel. (973) 736-3333 www.bederson.com	Edward P. Bond Hon. Francis G. Conrad Timothy J. King	Charles S. Lunden Charles N. Persing Sean Raquet Matthew Schwartz	Creditors' committees, debtors, trustees, as well as court-appointed examiners, mediators, fiscal agents, receivers, and fiduciaries. Client industries include automotive, banking and finance, construction, department stores, entertainment, food processors, healthcare, heavy equipment, hospitality, importing and exporting, intellectual property developers, law firms, leasing companies, manufacturing, oil and gas exploration, overseas corporations, publishing, real estate, retail, securities broker/dealers, surgical centers, textiles, trucking, warehousing, and others.
Compton & Wendler Houston, TX Tel. (713) 351-7110 www.cw-cpa.com	Jeff Compton Allen Wendler	Courtney Chlebus	Debtors, creditors, and trustees.
EisnerAmper LLP New York, NY Tel. (212) 949-8700 www.eisneramper.com	Allen Wilen Edward A. Phillips Anthony Calascibetta David Ringer Thomas Buck Joseph Myers	M. Jay Lindenberg Ira Spiegel Ben Kohen Linda Aron William Pedersen Georgiana Nertea	710 Long Ridge Road Operating Company II LLC, Morgan Industries, One2One Communications, LC Addington, Modern Precast Concrete, Saint Catherine Hospital of Pennsylvania, Richmond Wholesalers, MFGUC Liquidation Trust, Shoe Mania, USA United Holdings, Inc. et al, M Slavin and Suns LTD., Yandoli Foods, Inc., PN Chapter 11 Liquidating Trust, Qualteq, Inc. t/a VCT New Jersey, United Gilsonite, Mill River Foundation, Liberty State Insurance, Russ Berrie, Burns & Roe Future Claimants Representative, HH Liquidating Trust, Autobacs Strauss, Bayonne Med. Ctr., Designline Construction, New York State Banking Department, Michael Vick, Dunmore Homes Liquidation Trust, Pali Capital, Fabrikant Liquidation Trust.
Ellin & Tucker Baltimore, MD Tel: (410) 727-5735 www.etnet.com	Edwin R. Brake		Industries: automotive, construction, employee benefit plans, health care, hi-tech/biotech, law firms, manufacturing, professional services, printing, real estate, retail, wholesale distribution.
Ercolini & Company Boston, MA www recpa.com Tel. (617) 482-5511	Michael Tucci William Crane	Michael Bruno	Clients include real estate, professional services, educational institutions, start-up and closely-held businesses, hospitality, retail.
CohnReznick LLP Edison, NJ Tel. (732) 549-0700 www.cohnreznick.com	Bernard A. Katz Kevin P. Clancy Sharon Bromberg	Howard Konicov Chad J. Shandler Clifford A. Zucker	Advanced Living Technologies Inc. (Debtor); AFA Investments, Inc. (unsecured creditors' committee); Allen Family Foods (unsecured creditors' committee); Christ Hospital (unsecured creditors' committee); Hudson Healthcare, Inc. (unsecured creditors' committee); Interfaith Medical Center (Debtor); Majestic Capital , Ltd. (unsecured creditors committee); New Stream Secured Capital, et al. (debtors); PFF Bancorp. (unsecured creditors' committee); TOUSA, Inc., et al. (unsecured creditors' committee); Zacky Farms, LLC (unsecured creditors' committee).
Lain, Faulkner & Co. Dallas, TX Tel. (214) 720-1929 www.lainfaulkner.com	Dan B. Lain Dennis S. Faulkner Marla C. Reynolds Paul C. French, III	D. Keith Enger Stephen H. Thomas Lori B. Lowderman Jason A. Rae	Chapter 11 and Chapter 7 trustees, debtors-in-possession, unsecured creditors' committees, debtors, creditors' committees, chief restructuring officers, examiners, settlement and post-confirmation trustees, special claims analysts, secured creditors.
Marcum LLP New York, NY; Los Angeles, CA; West Palm Beach, FL Tel. (212) 485-5500 www marcumllp.com	Peter Buell Diane Giordano Paul Pershes	Alan Griffith Shaun Blogg	Automotive, healthcare, media & entertainment, hedge funds & investment partnerships, high technology, real estate, construction, insurance, retail & consumer products, talent & literary agencies, manufacturing, retail & distribution, governmental entities, maritime.

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Worth Reading

Taking America – How We Got from the First Hostile Takeover to Megamergers, Corporate Raiding and Scandal

Author: Jeff Madrick
Publisher Beard Books
Softcover: 310 pages
List Price: $34.95

As the subtitle reveals, *Taking America* connotes the indiscriminate buying of the nation's assets of large corporations by investment bankers, insider stock traders, arbitrageurs, and the like. This occurred in the mid-1970s, when low stock prices made many large corporations attractive as takeover targets. At the time, they were not ready for what was going to hit them. This was an era when the term "hostile takeover" came into use. Ivan Boesky, Carl Icahn, and T. Boone Pickens became household names for their bold attempts to buy out corporations. In doing so, they would stand to make hundreds of millions of dollars as the stock price of the acquired company rose. But in most cases, this would come at the cost of breaking up the newly-acquired company by selling off its most prized and valuable assets or by drastically reducing its work force to save on wage and benefits costs.

In many ways, this wave of buyouts and mergers fundamentally changed the way corporations did business; and it changed the way corporations were viewed. Corporations came to be seen not mainly as businesses relating to a particular industry sector or making a particular product. Such considerations as operations and growth within a particular or closely-related sector, employee security, and long-term strategic planning were swept aside by the single-minded aim of using cash and other assets as leverage to take over vulnerable, and often unsuspecting, corporations for a quick, huge profit. Running a corporation became the equivalent of playing the stock market. Madrick's *Taking America* was originally published in 1987, just after this wave of takeovers and mergers waned. But it subsided not from any restoration of rationality or temperance, but mainly from having succeeded so well. There were scarcely any big companies worth acquiring after the takeover frenzy ended.

Madrick chronicles this takeover spree occurring over the decade of the mid-1970s to the mid-1980s by following the activities of the key individuals driving it. Most of the participants in the takeover movement who are referred to in this book were interviewed by the author. Most of the book's content is based on these interviews. Besides the aforementioned takeover artists, other recognizable names in the author's long list of individuals he interviewed include Peter Drucker, Richard Cheney, Robert Rubin, and Felix Rohatyn.

Looking back over this period, Madrick sees a takeover movement that lost touch with key business principles. Instead of advancing the economic well-being of employees and the public, the perpetrators were intent on generating quickly-gained riches for themselves. Although Boesky and others were heavily fined or imprisoned for illegal conduct, their business practices took root. The "dot-com bubble" of the 1990's, when many young entrepreneurs in the field of computer technology tried to create businesses with the hope of soon being taken over by larger companies, is one instance of the legacy of this takeover era. The Enron approach to business is another, as are the business activities, particularly the financial legerdemain, of WestCom, Tyco, and Adelphia, to name a few. In *Taking America*, Madrick sheds much light on the origins of widespread problems in today's business world. ¤

Jeff Madrick is a regular contributor to The New York Review of Books*, and a former economics columnist for* The New York Times.

This book may be ordered by calling 888-563-4573 or by visiting www.beardbooks.com.

Universalism, *from page 4*

with which Waste2Energy had the closest connections. "The defendant and the other companies do not have any real substantive connection with the Isle of Man," he wrote. "They are simply incorporated here."

More importantly, in his decision Doyle spoke of the importance of universalism given that we operate in a global community. He quoted the words of the former justice of the Australian High Court, Michael Kirby, who said that we should see "the challenges of our time through the world's eye.

Doyle wrote that "there should be a unitary insolvency proceeding in the appropriate lead jurisdiction which receives worldwide recognition and applies universally to all of the insolvent's assets.… The assets of the insolvent entity should be distributed to creditors under a single universally applicable system of distribution."

"Even though the Isle of Man is not a party to the UNCITRAL Model Law on Cross Border Insolvency, the court adopted a core principle of the Model Law that there should be a 'unitary' insolvency proceeding in the jurisdiction with the most significant interests in the debtor company and that proceeding should be given world wide recognition," says Laurence May, a partner in Cole Schotz's bankruptcy & corporate restructuring department, which was counsel to the U.S. trustee.

"Prior to this decision, it was not at all clear if Isle of Man courts would accept the primacy of foreign insolvency proceedings when the debtor was organized under the laws of the Isle of Man," May continues.

Also in his decision, Doyle said he hoped that the Supreme Court of England and Wales would make a decision consistent with his in *Rubin v. Eurofinance*. A few weeks later, the U.K. court handed down a decision that appeared to contradict Doyle's. Weitz, however, says the facts were different. "In *Rubin*, the issue was whether a U.S. bankruptcy court could enforce, in the United Kingdom, a judgment against an individual not subject to U.S. court jurisdiction," he explains. "In Waste2Energy, the issue was the priority of creditor payments."

"The decision supported strict universalism," Weitz says. "It said, essentially, that wherever an insolvency exists, there should be one court and one judge." ¤

Special Report

Outstanding Young Restructuring Lawyers – 2013

Lawyer	Firm	Outstanding Achievements
Jasmine Ball	Debevoise & Plimpton New York, NY jball@debevoise.com	Special aircraft financing counsel to American Airlines in restructuring complex financing and purchase arrangements relating to over 1,000 aircraft. Represented Syncora Holdings and Syncora Guarantee in restructuring that relieved company of approx $6 billion in losses and loss reserves. Counsel to Brazilian media conglomerate Globo Comunicações e Participações, in restructuring approx $1.3 billion of debt.
Joshua Brody	Kramer Levin Naftalis & Frankel New York, NY jbrody@kramerlevin.com	Representing unsecured creditors' comm. of Hostess Brands, with approx. $2 billion in unsecured debt. Deeply involved in Hostess' efforts to obtain financing and to market its assets, as well as in labor negotiations and 1113 process at center of chapter 11 case. Also representing unsecured creditors' comm. of WP Steel Ventures, helping maximize recovery by negotiating a more reasonable timeline to sell assets.
Thomas R. Fawkes	Freeborn & Peters Chicago, IL tfawkes@freeborn.com	Creditors' committee counsel in New Energy, Wagstaff Minnesota, Giordano's Enterprises, and Harper Brush Works; liquidating trustee counsel in Schwab Industries; Chapter 7 trustee counsel in Knight-Celotex and Agri-Best Holdings; counsel to creditors, asset purchasers, and litigation parties in Eastman Kodak, Residential Capital, American Airlines, Lehman Brothers Holdings, and Ultimate Acquisition Partners.
Evan R. Fleck	Milbank Tweed Hadley & McCloy New York, NY efleck@milbank.com	Assumed leadership role in firm's representation of creditors' committee of Lehman Brothers. Heads firm's representation of creditors' committee in ATP Oil & Gas Corp., with reported liabilities of over $3.5 billion. Assisting in representation of creditors' committee of Arcapita Bank B.S.C., developing a nuanced understanding of unprecedented and complex issues involving Shari'ah-compliant financial institution.
Todd M. Goren	Morrison & Foerster New York, NY TGoren@mofo.com	Main partner in charge of negotiating and obtaining approval of two DIP facilities in ResCap, including $1.45 billion DIP facility recognized by IFR as restructuring of the year. Represented unsecured creditors' comm. in LA Dodgers' bankruptcy, obtaining 100 percent cash recovery plus interest. Represented Eurohypo Bank AG's NY branch and lenders having $2.6 billion exposure to General Growth Properties.
Stephen E. Hessler	Kirkland & Ellis New York, NY stephen.hessler@kirkland.com	A lead partner representing Ally Financial, Inc. (AFI) and Ally Bank in Chapter 11 case of AFI's mortgage servicing subsidiary, Residential Capital. One of the lead partners in Charter Communications and Calpine cases. Lead partner in Chapter 11 cases of UTGR, Inc., d/b/a Twin River Casino, and Majestic Star Casino and affiliates, consummating plan that reduced company's debt by approx. 78%.
Wojciech F. Jung	Lowenstein Sandler New York, NY wjung@lowenstein.com	Lead counsel for Strauss Discount Auto, consummating five sale transactions within 45 days of filing, negotiating post-petition DIP financing, and dealing with an array of complicated employee matters. Currently leading representation of creditors' committee in Zacky Farms. In Hostess Brands, represented a union in hotly contested litigation dealing with debtors' effort to modify collective bargaining agreements.
Jill L. Nicholson	Foley & Lardner Chicago, IL jnicholson@foley.com	National chair of firm's bankruptcy practice. Lead counsel for largest federal government-sponsored enterprise in 40 class actions in 22 states. Lead counsel in over $2 billion of distressed commercial loan transactions. 100% win rate in MERS-secured lender multidistrict litigation. Lead bankruptcy counsel for Fortune 150 auto supplier. Involved in U.S. Mortgage, American Housing, and Chrysler bankruptcies.
Arik Preis	Akin Gump Strauss Hauer & Feld New York, NY apreis@akingump.com	Representing unsecured creditors' committees in Edison Mission Energy, a group of lenders to another large energy company, a large logistics provider in solicitation of exchange offer of more than $1 billion of its creditors, and largest lenders to Pipeline Data Inc. Has concluded restructurings involving Dynegy Holdings and TerreStar Network. EME, DH, and TerreStar are among the largest cases of last 24 months.
Zachary H. Smith	Cadwalader, Wickersham & Taft New York, NY zachary.smith@cwt.com	Point person for firm's representation of Vertis Communications' complex, but successful, restructuring/363 sale. Prominent roles in several other high-profile restructurings, including Ciudadela Project, Caribbean Petroleum, Bank of America/Fred Leighton, U.S. Treasury – General Motors, Xerium Technologies, Centro Properties, St. Vincents Catholic Medical, Parmalat Finanziaria, and The Portland Trailblazers.
Richard A. Stieglitz, Jr.	Cahill Gordon New York, NY RStieglitz@cahill.com	Represented SP Newsprint, bringing multiple parties to consensus and successfully transferring ownership in complex case involving nearly a billion dollars in liabilities. Other debtor representations include Orleans Homebuilders, Trico Marine, Charlie Brown's restaurants, and Aurora Oil & Gas. Regularly represents large financial institutions, such as Barclays in connection with sale of ResCap's platform business.
Rachel C. Strickland	Willkie Farr & Gallagher New York, NY rstrickland@willkie.com	Spearheaded two successful prepackaged bankruptcies on behalf of Broadview Networks and Otelco Inc. In Broadview, led client through a 43-day case from filing through confirmation and overcame objections posed by Icahn Enterprises. Waged successful valuation fight for preferred equity holder in Smurfit Stone and obtained significant recoveries for secured debtholder in Aleris and Quiznos.

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Big Boys, *from page 4*

Mac Avoy also identified three key acknowledgements that should be included by any party drafting a "big boy" letter: (1) that the counterparty is sophisticated; (2) that the parties are acting in their own self-interest; and (3) that the counterparty had the opportunity to do its own due diligence and either completed that diligence or elected not to do its own diligence.

Finally, Mac Avoy clarified the type of sophistication that courts will likely look for in distressed situations such as claims trading, where one party may be much more experienced in the specific type of transaction than the counterparty. While "sophistication of the counterparty is critical and the use of 'big boy' letters is not a license to cheat someone," the standard is "not just sophistication in that specific area, but overall business sophistication." She noted that, for example, sophisticated companies who have the ability to understand the transaction and seek outside advisors are likely to see their agreements enforced even where they have not previously sold claims against a bankrupt company. Therefore, the impetus will be on these companies to seek guidance from experienced advisors before entering into these types of agreements. ¤

Decision Making, *from page 2*

Mirick was intrigued. "There are lots of anecdotes about companies timing their filings," he says. "For example, you hear about retailers wanting to file after the Christmas season because then they will have the biggest pile of cash, creating a war chest for the bankruptcy. I spoke to several practitioners and judges about it. Lots of people said, 'Well, yeah, we all know there's some strategy involved in the timing of filings.' But the specific question Harlan was putting, whether there is a calendar effect, a seasonality to the filing decision, left people I talked to scratching their heads."

The primary topic the researchers tackled, then, was the issue of calendar effects. One example: the so-called January effect, which refers to the fact that stocks generally provide abnormally high returns in January, possibly because of investors selling in December to take a tax loss, then buying the shares back after the required 30 days, in January.

Of course, this effect isn't quite rational, because a rational investor, understanding the January effect, might sell his or her stock in November. With enough rational investors doing this, the January effect would be reduced or negated.

According to the researchers, the decision to file for bankruptcy seemed likely to conform to "the rationality framework," with companies filing when their financial circumstances are untenable and are not likely to improve in the future. That said, they wondered if the decision might also have a behavior component: a desire to file early in the year in order to achieve a fresh start or to file at the end of the summer as people get back to work, for example.

Given the paucity of information on this topic, the researchers got started with their own study, obtaining bankruptcy filing data from the American Bankruptcy Institute on the number of bankruptcy filings. They also obtained data about economic activity from Freelunch.com, a Moody's company that accesses data from various sources, including the Federal Reserve and the Department of Commerce. They then ran regression models using statistical software.

The researchers found some seasonality to consumer bankruptcy filings; they found none to business filings. "The lack of seasonality in business filings didn't surprise me for two reasons," says Mirick. "First, companies have different fiscal years, so the calendar year for many is irrelevant; they don't all have taxes due on April 15 the way consumers do. Second, companies are more likely to have the resources to weather tough situations longer, making the calendar year less important than the business climate."

The researchers also found that BAPCPA had no effect on business bankruptcy filings – not surprising, they said, because business filings involve higher asset values and larger levels of secured and unsecured debt, which may make business filers follow a rational process wherein the petition is filed when it is most suitable on a cost/benefit basis.

On the other hand, says Mirick, "we did confirm that an increase in real GDP leads to a decrease in business bankruptcy filings, or put the other way around, a decrease in GDP leads to an increase in business bankruptcy filings."

"We're not saying that the timing issue overwhelms the impact of GDP," adds Platt. "Clearly, a company that is doing well is not going to file for bankruptcy at that time. We're saying when companies are doing poorly, then they sit down and start thinking about tax schedules and so forth, and then decide when they should file."

The end result according to Platt: "Consumer Chapter 11s and business filers appear to file their petitions not according to seasonal effects but rather … by rational calculations pertaining to debt obligations, cash flow, or the availability of credit." ¤

In the Next Issue…

- *Special Report: Major Trade Claim Purchasers*
- *Special Report: Top Internet Bankruptcy Resources*
- *Research Report: Who's Who in Flat Out Crazy, LLC*

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